Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal EA-2019-009

Hyundai Heavy Industries (Canada) d.b.a. Remington Sales Co.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Thursday, May 12, 2022

Corrigendum issued
Wednesday, June, 14, 2023

TABLE OF CONTENTS

IN THE MATTER OF an appeal heard on November 25 and 26, 2020, pursuant to section 61 of the *Special Import Measures Act*;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated November 5, 2019, with respect to re-determinations made pursuant to section 59 of the *Special Import Measures Act*.

BETWEEN

HYUNDAI HEAVY INDUSTRIES (CANADA) D.B.A. REMINGTON SALES CO. **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION

The appeal is allowed in part. The Canadian International Trade Tribunal remands the President's decisions back to the Canada Border Services Agency for reconsideration.

Serge Fréchette

Serge Fréchette
Presiding Member

IN THE MATTER OF an appeal heard on November 25 and 26, 2020, pursuant to section 61 of the *Special Import Measures Act*;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated November 5, 2019, with respect to re-determinations made pursuant to section 59 of the *Special Import Measures Act*.

BETWEEN

HYUNDAI HEAVY INDUSTRIES (CANADA) D.B.A. REMINGTON SALES CO. **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

CORRIGENDUM

The last sentence of paragraph 1 should read as follows:

This appeal has proceeded concurrently with two related appeals filed by Hyundai Canada Inc. (Hyundai Canada).

[Footnote omitted]

The last two sentences of paragraph 13 should read as follows:

On April 2, 2020, the Tribunal granted ABB intervener status in this proceeding, as it was satisfied that it had a direct and substantial interest in the appeal. The Tribunal did, however, direct ABB to limit its submissions and evidence to those which were relevant to the appeal and to avoid broadening the scope of the appeal beyond that which was contemplated in Remington's notice of appeal.

[Footnote omitted]

Paragraph 22 should read as follows:

In this appeal, the relevant situation is that in which the export price may be determined under section 25 (section 25 export price), where the President of the CBSA is of the opinion that the export price determined under section 24 (section 24 export price) is "unreliable" by reason that the sale of the good for export to Canada was a sale between associated persons.

By order of the Tribunal,

Serge Fréchette

Serge Fréchette
Presiding Member

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	November 25 and 26, 2020
Tribunal Panel:	Serge Fréchette, Presiding Member
Tribunal Secretariat Staff:	Peter Jarosz, Counsel Kalyn Eadie, Counsel Isaac Turner, Counsel Stephanie Blondeau, Registrar Officer

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Hyundai Heavy Industries (Canada) d.b.a. Remington Sales Co.	Darrel Pearson George Reid Ethan Gordon
Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Jennifer Bond Marshall Jeske Peter Nostbakken
Intervener	**Counsel/Representatives**
ABB Power Grids Canada Inc.	Christopher J. Kent Christopher J. Cochlin Marc McLaren-Caux Andrew M. Lanouette Gerry Stobo Andrew Paterson Susana May Yon Lee Alexander Hobbs

Please address all communications to:

The Deputy Registrar
Telephone: 613-993-3595
Email: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

SUMMARY

[1] This appeal is filed by Remington Sales Co. d.b.a. Hyundai Heavy Industries (Canada) (Remington)[1] from re-determinations of anti-dumping duties made by the President of the Canada Border Services Agency (CBSA). This appeal has proceeded concurrently with two related appeals filed by Hyundai Canada Inc. (Hyundai Canada).[2]

[2] Remington imports power transformers produced in the Republic of Korea (Korea) by an associated party, Hyundai Electric & Energy Systems (Hyundai Electric), for resale to unrelated purchasers in Canada. An assessment of anti-dumping duties under the *Special Import Measures Act* (SIMA) was made on these importations, based on a comparison of their export prices and normal values; Remington disputes the CBSA re-determinations regarding the export prices of the importations at issue.

[3] Hyundai Canada appeals on the basis that the President of the CBSA erred in the re-determinations of export prices under sections 24 and 25 of SIMA, specifically with respect to the following:

(a) the reliability of export prices determined under section 24; and

(b) the deductions made in re-determining export prices under sections 24 and 25.

[4] For the reasons below, the Tribunal concludes that the President of the CBSA erred in the re-determinations of export prices and remands the President's decisions back to the CBSA for reconsideration.

PROCEDURAL BACKGROUND

[5] On October 22, 2012, the President of the CBSA made a final determination of dumping pursuant to subsection 41(1)(a) of SIMA respecting liquid dielectric transformers (power transformers) having a top power handling capacity equal to or exceeding 60,000 kilovolt amperes (60 megavolt amperes), whether assembled or unassembled, complete or incomplete, originating in or exported from Korea.

[6] On November 20, 2012, the Tribunal made a finding that the dumping had caused injury to the domestic industry.[3]

---

1 Remington noted at the hearing that its correct name is Remington Sales Co. d.b.a. Hyundai Heavy Industries (Canada). See *Transcript of Public Hearing* (25 November 2020) at 4.

2 See EA-2019-008 and EA-2019-010.

3 See *Liquid Dielectric Transformers* (20 November 2012), NQ-2012-001 (CITT). On November 21, 2012, an application for judicial review of the CBSA's final determination of dumping was made to the Federal Court of Appeal (FCA) by Hyundai Heavy Industries. On December 6, 2013, the FCA set aside the CBSA's final determination and referred the matter back to the President of the CBSA for reconsideration in accordance with the FCA's reasons. On March 6, 2014, the President made a new final determination of dumping pursuant to paragraph 41.1(1)(a) of SIMA. On May 31, 2016, the Tribunal decided, in the context of an interim review being held to determine whether its previous finding was impacted by the new final determination of dumping, to continue its finding that the dumping had caused injury to the domestic industry without amendment.

[7] On November 15, 2018, the CBSA initiated a normal value and export price review to update the normal values and export prices applicable to power transformers exported from Korea to Canada by Hyundai Electric. The period of investigation was from November 1, 2016, to October 31, 2018.[4]

[8] On July 25, 2019, the CBSA concluded its normal value and export price review. As part of this review, the CBSA determined that Remington is related to Hyundai Electric, in accordance with the definition of "related" set out in subsection 2(3) of SIMA, and that they are therefore associated persons for the purposes of paragraph 25(1)(b). As a result, the CBSA carried out a "reliability test" and found that the prices of power transformers exported from Hyundai Electric to Remington were not reliable. Consequently, Remington was advised that all export prices of the subject power transformers for any possible future importations would be determined pursuant to paragraph 25(1)(d). The CBSA specified that these revised parameters were effective for goods released on or after July 25, 2019.[5]

[9] On August 7, 2019, the CBSA informed Remington that it had completed its calculation of the applicable retroactive duties and that the retroactive assessments of anti-dumping duties would be applied on sales of dumped goods that occurred within the previous two years (i.e. on or after July 25, 2017).[6]

[10] On November 5, 2019, pursuant to section 59 of SIMA, the President of the CBSA retroactively reassessed the anti-dumping duties payable on power transformers imported by Remington on or after July 25, 2017.[7]

[11] On January 13, 2020, Remington filed its appeal with the Tribunal in accordance with section 61 of SIMA.[8]

[12] On January 14, 2020, the parties requested that the hearing for this appeal proceed at the same time as the hearing in EA-2019-008, since the nature of the subject goods and the major issues raised in the appeals were substantially the same. The request was granted on January 17, 2020.[9]

[13] On March 23, 2020, ABB Power Grids Canada Inc. (ABB) requested to participate as an intervener.[10] On March 26, 2020, the CBSA advised the Tribunal that it agreed that ABB should be granted intervener status in the proceedings.[11] On March 30, 2020, Remington requested that the Tribunal not grant ABB intervener status, because ABB's request to intervene lacked the specificity required to allow the Tribunal to assess whether ABB's intervention satisfied the mandatory requirements set out in section 40.1 of the *Canadian International Trade Tribunal Rules*. It also requested that, should the Tribunal choose to grant intervener status to ABB, the Tribunal limit ABB's intervener rights to filing a written case brief.[12] On April 2, 2020, the Tribunal granted ABB intervener status in this proceeding, as it was satisfied that it had a direct and substantial interest in the appeal. The Tribunal did, however, direct ABB to limit its submissions and evidence to those

4 Exhibit EA-2019-009-06 at 5, 81.
5 Exhibit EA-2019-009-06A (protected) at 4637–4638, 4643–4646.
6 *Ibid.* at 4651–4652.
7 *Ibid.* at 4670–4732.
8 Exhibit EA-2019-009-01.
9 Exhibit EA-2019-009-04.
10 Exhibit EA-2019-009-08.
11 Exhibit EA-2019-009-10.
12 Exhibit EA-2019-009-11.

which were relevant to the appeal and to avoid broadening the scope of the appeal beyond that which was contemplated in Remington's notice of appeal.[13]

[14] On June 2, 2020, the Tribunal informed the parties that, due to the situation concerning COVID-19, the hearing, which was to take place on July 22, 2020, was cancelled and would be rescheduled at a later date.[14]

[15] On June 3, 2020, the Tribunal requested additional submissions from the parties regarding the correct export prices for the importations in question and the appropriate methodology to establish those prices.[15] Submissions were received on July 3, 2020, and reply submissions, on August 24, 2020.

[16] On August 31, 2020, the Tribunal informed the parties that the hearing would proceed by way of videoconference and asked that parties select a mutually agreed date.[16]

[17] The Tribunal held a public videoconference and an *in camera* teleconference hearing on November 25 and 26, 2020.

LEGAL AND POLICY FRAMEWORK

[18] Anti-dumping duties are calculated by comparing the normal value (the selling price in the exporter's market or a constructed profitable selling price) with the export price of the goods in issue. If the export price is lower than the normal value, the goods are dumped and the difference between the two represents the quantum of duties payable.

[19] Export prices can be determined under section 24 or, in certain cases, section 25 of SIMA.

[20] Where an export price is determined under section 24, it is simply the price as agreed upon by the importer and the exporter, with certain adjustments to remove exportation- and importation-related deductions. Section 24 provides as follows:

> **24** The export price of goods sold to an importer in Canada, notwithstanding any invoice or affidavit to the contrary, is *an amount equal to the lesser of*
>
> **(a)** *the exporter's sale price for the goods*, adjusted by deducting therefrom
>
> **(i)** the costs, charges and expenses incurred in preparing the goods for shipment to Canada that are additional to those costs, charges and expenses generally incurred on sales of like goods for use in the country of export,
>
> **(ii)** any duty or tax imposed on the goods by or pursuant to a law of Canada or of a province, to the extent that the duty or tax is paid by or on behalf or at the request of the exporter, and

13 Exhibit EA-2019-009-12.
14 Exhibit EA-2019-009-21.
15 Exhibit EA-2019-009-22.
16 Exhibit EA-2019-009-42.

> **(iii)** all other costs, charges and expenses resulting from the exportation of the goods, or arising from their shipment, from the place described in paragraph 15(e) or the place substituted therefor by virtue of paragraph 16(1)(a), and
>
> **(b)** *the price at which the importer has purchased or agreed to purchase the goods*, adjusted by deducting therefrom all costs, charges, expenses, duties and taxes described in subparagraphs (a)(i) to (iii).
>
> [Emphasis added]

[21] However, in certain cases, section 25 is used to determine the export price. In those cases, the export price is based on the importer's price of the goods sold to an unrelated purchaser in Canada, with the same adjustments as are made under section 24. In addition, the importer's costs associated with selling the goods and an amount for profit are also deducted from the price. Specifically, section 25 provides as follows:

> **25 (1)** Where, in respect of goods sold to an importer in Canada,
>
> **(a)** there is no exporter's sale price or no price at which the importer in Canada has purchased or agreed to purchase the goods, or
>
> **(b)** *the President is of the opinion that the export price, as determined under section 24, is unreliable*
>
> **(i)** *by reason that the sale of the goods for export to Canada was a sale between associated persons*, or
>
> **(ii)** by reason of a compensatory arrangement, made between any two or more of the following, namely, the manufacturer, producer, vendor, exporter, importer in Canada, subsequent purchaser and any other person, that directly or indirectly affects or relates to
>
> **(A)** the price of the goods,
>
> **(B)** the sale of the goods,
>
> **(C)** the net return to the manufacturer, producer, vendor or exporter of the goods, or
>
> **(D)** the net cost to the importer of the goods,
>
> the export price of the goods is
>
> **(c)** if the goods were sold by the importer in the condition in which they were or are to be imported to a person with whom, at the time of the sale, he was not associated, the price for which the goods were so sold less an amount equal to the aggregate of
>
> **(i)** all costs, including duties imposed by virtue of this Act or the *Customs Tariff* and taxes,

(A) incurred on or after the importation of the goods and on or before their sale by the importer, or

(B) resulting from their sale by the importer,

(ii) an amount for profit by the importer on the sale,

(iii) the costs, charges and expenses incurred by the exporter, importer or any other person in preparing the goods for shipment to Canada that are additional to those costs, charges and expenses generally incurred on sales of like goods for use in the country of export, and

(iv) all other costs, charges and expenses incurred by the exporter, importer or any other person resulting from the exportation of the imported goods, or arising from their shipment, from the place described in paragraph 15(e) or the place substituted therefor by virtue of paragraph 16(1)(a),

(d) if the goods are imported for the purpose of assembly, packaging or other further manufacture in Canada or for incorporation into other goods in the course of manufacture or production in Canada, *the price of the goods as assembled*, packaged or otherwise further manufactured, or of the goods into which the imported goods have been incorporated, *when sold to a person with whom the vendor is not associated at the time of the sale, less an amount equal to the aggregate of*

(i) an amount for profit on the sale of the assembled, packaged or otherwise further manufactured goods or of the goods into which the imported goods have been incorporated,

(ii) the administrative, selling and all other costs incurred in selling the goods described in subparagraph (i),

(iii) the costs that are attributable or in any manner related to the assembly, packaging or other further manufacture or to the manufacture or production of the goods into which the imported goods have been incorporated,

(iv) the costs, charges and expenses incurred by the exporter, importer or any other person in preparing the imported goods for shipment to Canada that are additional to those costs, charges and expenses generally incurred on sales of like goods for use in the country of export, and

(v) all other costs, charges and expenses, including duties imposed by virtue of this Act or the *Customs Tariff* and taxes,

(A) resulting from the exportation of the imported goods, or arising from their shipment, from the place described in paragraph 15(e) or the place substituted therefor by virtue of paragraph 16(1)(a) that are incurred by the exporter, importer or any other person, or

> **(B)** incurred on or after the importation of the imported goods and on or before the sale of the goods as assembled, packaged or otherwise further manufactured or of the goods into which the imported goods have been incorporated, or
>
> **(e)** in any cases not provided for by paragraphs (c) and (d), the price determined in such manner as the Minister specifies.
>
> **(2)** No deduction for duties imposed by virtue of this Act may be made under
>
> **(a)** subparagraph (1)(c)(i), in the case of an export price determined under paragraph (1)(c), or
>
> **(b)** subparagraph (1)(d)(v), in the case of an export price determined under paragraph (1)(d),
>
> where, in the opinion of the President, the export price determined under either of those paragraphs without making such a deduction is equal to or greater than the normal value of the goods.
>
> [Emphasis added]

[22] In this appeal, the relevant situation is that in which the export price may be determined under section 25 (section 25 export price), where the President of the CBSA is of the opinion that the export price determined under section 24 (section 24 export price) is "unreliable" by reason that the sale of the good for export to Canada was a sale between associated persons.

[23] SIMA does not define the term "unreliable". The CBSA has adopted a procedure called the "reliability test", which it describes in the SIMA Handbook as the "usual 'tool' used to help the President form an opinion as to whether export prices determined under section 24 are unreliable, as envisaged by SIMA".[17] To perform the reliability test, the CBSA will select a representative sample of transactions and perform the export price calculation using the methodology of section 24 and then using the methodology of section 25 and compare the two results. If the section 25 export price is equal to or greater than the section 24 export price in 80 percent or more of the sample transactions, measured by volume or value as appropriate, then the section 24 export price will normally be considered reliable. Conversely, if the section 25 export price is lower than the section 24 export price in more than 20 percent of the sample transactions, then the section 24 export price will usually be considered unreliable, and section 25 will be used to determine export prices for that exporter. The SIMA Handbook provides for certain exceptions, which are discussed further below.

[24] The aim of the calculations under both sections 24 and 25 is to arrive at an ex-factory price for the goods. Thus, section 24 dictates that all costs, charges, expenses, etc. that are associated with selling the goods to an importer in Canada are deducted from the price charged by the exporter to the importer. Under section 25, all additional costs, etc. that are associated with the resale, as well as an amount for profit, are also deducted. However, pursuant to sections 20 to 22 of the *Special Import Measures Regulations* (Regulations), the amount for profit that is to be deducted from the importer's resale price in the section 25 calculation is not the amount of profit actually realized by the importer on the sale but an amount representative of the average industry profit in Canada. Ultimately, this means that what the reliability test measures is whether the importer is actually obtaining an amount for profit that is less than the average industry amount on more than 20 percent of the sales in the

---

17 Exhibit EA-2019-009-07 at 1378.

sample. The CBSA refers to this situation as "hidden" or "secondary dumping". According to the CBSA:

> A primary objective of section 25 of the Act is to ensure that the protection intended by a dumping action is not jeopardized due to related exporters and importers, intentionally or otherwise, in some way absorbing the impact of the anti-dumping action. In such cases, section 25 ensures that the resale price in Canada of the imported product increases to eliminate the injurious effect on Canadian producers.[18]

[25] It must be noted that the application of section 25 can result in more than just a change in the quantum of export prices. A section 25 export price can be higher or lower than, or equal to, a section 24 export price, but there are other significant consequences. The SIMA Handbook describes these consequences as follows:

> It is important to note that notwithstanding the preceding paragraph, subsection 25(2) of SIMA stipulates that no deduction for SIMA duties may be made where, in the opinion of the President, the export price determined under either paragraph 25(1)(c) or (d) without making such a deduction is equal to or greater than the normal value of the goods. Therefore, after the reliability test has been conducted and it is determined that export prices must be determined under section 25, the section 25 export price must be compared to the normal value to see whether there is any dumping before a deduction is made for SIMA duties. If there is no dumping, the exercise is concluded at that point. *If dumping is found, however, then SIMA duties previously paid or payable are deducted. The resulting lower section 25 export price is compared to the normal value to determine the margin of dumping and the final amount of SIMA duties to be paid.*
>
> As already noted earlier, the SIMA duties are never deducted when performing the reliability test calculation.[19]
>
> [Emphasis added]

[26] Therefore, the issue of whether section 24 or section 25 is applied to determine export prices can have far-reaching consequences over and above their quantum, and the choice of the section to be applied must be made correctly even if there is no difference in the quantum of the export prices under either section.

POSITIONS OF THE PARTIES

Remington

[27] Remington submitted that the President of the CBSA erred in the re-determinations of anti-dumping duties by concluding incorrectly that Remington's export prices determined under section 24 of SIMA were unreliable.

[28] Remington argued that the test used by the CBSA to determine reliability fetters the President's discretion and confuses the outcome of a reliability finding with a measure of reliability.

---

18 *Ibid.*

19 *Ibid.* at 1389.

[29] Remington argued that the test, as applied, measures an importer's resale profitability against the amount for profit calculated under subparagraph 25(1)(d)(i) rather than the reliability of the section 24 export prices. Remington argued that this test is based on factors that are irrelevant or beyond the President's mandate to consider and resulted in the President forming an opinion that is neither fair nor impartial.

[30] Remington also argued that, in the event that the Tribunal accepted the President's reliability test as applied, the President improperly formed the opinion that Remington's export prices failed the test. It submitted that the CBSA should have assessed the difference between the section 24 and section 25 export prices in light of the total value of the sample as opposed to the volume and that a value assessment would produce a "diametrically opposite" result to the volume analysis. Remington argued that value is the appropriate method to determine reliability in this case, because power transformers are custom-made goods and their selling prices vary depending on the matrix of various customizable specifications that can be selected by a purchaser.

[31] Remington also submitted that the President made incorrect deductions in re-determining export prices under section 25 of SIMA. Regarding these, Remington made several arguments.

[32] First, Remington argued that the deduction of service revenues was incorrect, because paragraph 25(1)(d) requires the deduction of an amount for profit and the importer's expenses (i.e. direct expenses and indirect selling expenses) in selling an assembled good, not the deduction of revenue.

[33] Second, Remington argued that (although it did not contest, in and of itself, the amount of profit used by the CBSA) there is an "obvious mismatch" when service revenues are deducted in the paragraph 25(1)(d) calculation, but the amount for profit calculation is based on manufacturing profits which include service revenues.

[34] Third, Remington argued that the CBSA has an unfair policy of selecting the higher of service expenses or revenues to deduct (referred to as the "higher-of rule") for the purpose of depressing the section 25 export prices.

[35] Fourth, Remington argued that the expenses deducted should be those incurred by the importer and not third-party expenses, because the paragraph 25(1)(d) calculation is intended to be an estimate of what the importer would have paid for the goods.

[36] Fifth, Remington argued that, like the practice of selecting the higher of service expenses or revenues to deduct, discussed above, the CBSA also has an unfair policy of selecting the higher of third-party expenses or revenues to deduct.

[37] Sixth, Remington argued that a specific item that was unforeseen was extraneous and should not have been deducted in the determination of the section 25 export prices.

[38] Remington argued that, taken together, the correction of these errors would result in a finding that its section 24 export prices were reliable.

[39] In addition, Remington argued that the deduction of service revenues was procedurally and substantively unfair and contrary to natural justice, because the CBSA had informed it in a previous proceeding that the President had deducted, and would deduct, expenses from the paragraph 25(1)(d) export price. These procedural errors were not raised as a distinct ground of appeal but instead were presented as being relevant insofar as they related to substantive legal errors that were made.

CBSA

[40] The CBSA argued that the President properly exercised his discretion in finding that the section 24 export prices were unreliable. The CBSA argued that SIMA does not explicitly define or limit what is meant by "unreliable" and that Parliament has expressly conferred broad discretion on the President to determine whether section 24 export prices are reliable. Further, the CBSA argued that the reliability test allows importers an opportunity to show that their section 24 export prices are reliable, despite the fact that the parties to the sale are associated, and ensures that the formation of the President's opinion is facts-based, transparent and consistent.

[41] The CBSA argued that the reliability of section 24 export prices can only be determined when the section 24 and section 25 export prices are compared, because the mischief that the reliability investigation is trying to uncover (i.e. hidden or secondary dumping) will only be apparent upon consideration of the importer's resale price of the goods in Canada. The CBSA further argued, in response to Remington's argument that the sample should have been assessed based on the difference in total value, that this is not how the reliability test works. The CBSA argued that the reliability test does not measure by how much lower the section 25 export prices are than the section 24 export prices but rather the frequency with which the section 25 export prices are lower than the section 24 export prices.

[42] The CBSA further argued that the President did not err by excluding revenues for non-subject services in calculating the section 25 export prices. The CBSA argued that Remington's argument that expenses should have been deducted rather than revenues shows that Remington misunderstood the President's calculations; the President did not deduct revenues or expenses from the non-subject services but rather eliminated the prices charged for the non-subject services from the extended selling price so that the starting point of the section 25 calculation reflected the actual selling price of the transformers.

[43] The CBSA likewise argued that the President did not err by deducting third-party expenses in calculating section 24 and section 25 export prices. For the section 24 calculation, the CBSA argued that the purpose of the deductions is to remove the costs associated with the movement and exportation of the subject goods to arrive at an ex-factory selling price that can be compared to normal values and that the wording of SIMA does not limit these deductions to those costs that were incurred by the importer. For the section 25 calculation, the CBSA argued that there was no merit to Remington's submission that the explicit reference to "exporter, importer, or any other person" should not apply to this scenario and that only costs directly incurred by the importer should be deducted. To this point, the CBSA adds that, given that the parties are related, the President had to account for the costs incurred by all three parties to ensure that anti-dumping measures were not being circumvented through the related-party transactions.

[44] Regarding the allegations that the deduction of service revenues was procedurally and substantively unfair, the CBSA argued that there is no merit to Remington's argument, and, in any case, the Tribunal has consistently held that it lacks jurisdiction to determine appeals on grounds of procedural fairness or natural justice.

ABB

[45] ABB submitted that the correct provision of SIMA for determining export prices in this case is paragraph 25(1)(c) rather than paragraph 25(1)(d), because the goods were sold "in the condition in which they were or are to be imported" (i.e. unassembled) rather than "for the purpose of assembly". ABB acknowledged that the mathematical application of that provision would result in the same export prices and conclusions on reliability determined by the CBSA and, in essence, already reflects the approach taken by the CBSA.

[46] ABB argued that SIMA grants the President wide discretion in determining reliability and that neither SIMA nor the Regulations specify the manner in which the President is to form his opinion of reliability. ABB argues that there is no principled reason to accept the "value test" proposed by Hyundai Canada and that the volume-based test used by the CBSA was reasonable. With respect to the finding of unreliability itself, ABB argued that the mere existence of the association is sufficient to form the opinion that Remington's export prices determined under section 24 of SIMA were unreliable.

[47] Regarding the deduction of service revenues, ABB argued that the CBSA was correct to look behind non-subject goods and services to arrive at the price of the goods instead of the charges associated with non-subject goods and services. ABB argued that Remington's argument concerning the difference between revenues and costs is a red herring and that the crux of the issue is that Remington misunderstood the CBSA's calculations. ABB also argued that it was incorrect for Remington to claim that the CBSA had double-deducted profits, because neither costs nor revenues associated with non-subject revenue sources were included in either the normal values or the export prices under the CBSA's approach.

[48] With respect to the argument regarding the deduction of costs incurred by third parties, similarly to the points made above with respect to the deduction of services revenue, ABB argued that Remington's arguments are without merit. ABB argued that SIMA expressly requires the CBSA to deduct expenses incurred by the exporter, importer, or any other person to arrive at an ex-factory price and that not deducting these expenses would preclude an apples-to-apples comparison of normal values and export prices.

ANALYSIS

[49] For the same reasons as given in EA-2019-008 and EA-2019-010, the Tribunal finds that the guidelines and the policy contained in the SIMA Handbook are an incorrect interpretation of sections 24 and 25 of SIMA to the extent that they limit the reliability test to a mere comparison of the section 24 export prices to the section 25 constructed export prices.

[50] For the same reasons given in EA-2019-008 and EA-2019-010, the Tribunal also makes several findings regarding the deductions made in re-determining export prices under sections 24 and 25 of SIMA:

(a) The Tribunal finds that the deductions of service revenues are not deductions from the section 25 export prices. They are instead an amount representing the value of services that was correctly removed from the section 25 calculation at the outset for not pertaining to the value or price of the subject goods.

(b) The Tribunal finds that, as the amount of profit is not being challenged, its deduction cannot be an issue, regardless of whether there are amounts regarding profit on services in the profit calculation.

(c) The Tribunal finds that it is not convinced that the evidence shows that the CBSA engaged in the practice of selecting the higher of service expenses or revenues for the purpose of reducing the section 25 export prices.

(d) The Tribunal finds that the CBSA correctly deducted third-party expenses for the purpose of arriving at the ex-factory price.

(e) For reasons of judicial economy, the Tribunal will not address whether paragraph 25(1)(c) should be applied rather than paragraph 25(1)(d). Nothing turns on the outcome of this question in the context of this proceeding.

[51] In addition to the above, with respect to Remington's submission that a specific item that was unforeseen is extraneous and should not have been deducted in the section 25 calculation, the Tribunal finds that there is no support for this position in SIMA.[20] The predictability of expenses is irrelevant in arriving at a fairly comparable price in a transaction. Expenses regarding the goods in question must be deducted if they were incurred, regardless of whether they were foreseen or not.

DECISION

[52] The appeal is allowed in part. The Tribunal remands the President's decisions back to the CBSA for reconsideration on the basis of the reasons set out above.

Serge Fréchette

Serge Fréchette
Presiding Member

[20] As the nature of the unforeseen item is confidential, the Tribunal cannot elaborate further in these reasons.